No. 15,106

United States Court of Appeals

For the Ninth Circuit

RICAREDO BERNABE DELA CENA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S REPLY BRIEF.

HOWARD K. HODDICK,
320 Damon Building,
Honolulu, T. H.,
Attorney for Appellant.

Table of Authorities Cited

Cases

Codes and Statutes

No. 15,106

United States Court of Appeals
For the Ninth Circuit

RICAREDO BERNABE DELA CENA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S REPLY BRIEF.

This reply is limited to the questions raised by Appellee concerning whether Appellant qualifies for naturalization under Sec. 324(a) of the Nationality Act of 1940, former 8 U.S.C. 724, or under Sec. 328 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1439.

It is the Appellee's position that Appellant does not qualify for naturalization under the provisions of Sec. 324(a) of the 1940 Act, or under the provisions of Sec. 328 of the 1952 Act, because he was not resident within the United States during a part of the five year period preceding the filing of the petition

when he was not in the Armed Forces. (Appellee's Br.p.14). It is further Appellee's position that Appellant does not qualify for naturalization under the provisions of Sec. 328 on the ground that he was not lawfully admitted for permanent residence. (Appellee's Br.p.14).

Appellant's counsel has been able to find no language in Sec. 328 which requires lawful admission to the United States for permanent residence as a prerequisite to naturalization under that section.

When a petitioner's service in the Armed Forces has not been continuous it is not necessary to allege and prove residence within the United States "during any period within five years immediately preceding the date of filing such petition between the periods of petitioner's service in the Armed Forces" under Sec. 324 of the 1940 Act or Sec. 328 of the 1952 Act unless the petitioner has in fact been resident within the United States. *In re Fleischmann,* 49 F. Supp. 223 (1943-D.C.W.D.N.Y.).

In the *Fleischmann* case the petitioner, as an alien who had had non-continuous maritime service, applied for naturalization under the provisions of Sec. 325 (a)(2) of the Nationality Act of 1940, former 8 U.S.C. 725. Section 325 required compliance with Section 324 (c), former 8 U.S.C. 724(c). Section 324(c) is the same section on which Appellee relies in support of its argument that Appellant to qualify under Sec. 324 must show residence in the United States during the out-of-service period, and is for practical purposes the same as Sec. 328(c) of the 1952 Act. A similar

argument was made by the government in the *Fleischmann* case and the Court stated at page 224:

> "It appears palpable that such 'residence' in Section 324(c) only calls for such residence as *may be* verified and proved in the same manner as under Sec. 309, supra. It would do violence to the clear intent of both Section 324 and Section 325 to hold that only 'legal residence' was considered in Section 324(c). If 'legal residence' was intended in Section 324(c), then there would be no point in exempting the petitioner from a certificate of arrival except to save him a fee therefor." (Emphasis supplied)

Likewise in the instant case, there would be no point in granting to an alien who has completed three years of service, whether continuous or not, the right to become a naturalized citizen even though not a resident of the United States at the time the petition is filed or during the periods of his service, and also granting him while in uniform the privilege of entering the United States without an immigrant visa or other travel document (Section 212.4, Title 8, C.F.R.), and then requiring him to allege or verify and prove residence within the United States during the out-of-service period. It must be assumed that Congress was aware of the fact that thousands of aliens saw overseas service in the Armed Forces of the United States.

For the foregoing reasons it is respectfully submitted that neither Sec. 324(c) of the 1940 Act nor Sec. 328(c) of the 1952 Act require proof of residence within the United States during any out-of-service

period within five years immediately preceding the filing of the petition, if, as the facts here show, there was no such residence.

CONCLUSION.

That the appeal should be sustained and the final order of the District Court reversed.

Dated, Honolulu, T.H.,
September 28, 1956.

HOWARD K. HODDICK,
Attorney for Appellant.